THE NOVA SCOTIA TRIBUNAL ON PROVINCIAL COURT JUDGES' SALARIES AND BENEFITS (2001 - 2004)

REPORT AND RECOMMENDATIONS FOR THE PERIOD APRIL 1, 2002 - MARCH 31, 2005

Tribunal Members:
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Halifax, Nova Scotia

A. Introduction

This is the second report of the independent tribunal established by statute of the Province of Nova Scotia to make recommendations to determine the salaries and benefits for judges of the Provincial Court and the Family Court. While Nova Scotia was the first province in Canada to involve a tribunal to make recommendations to government on these issues, the present tribunal system was created by 1998 amendments to the *Provincial Court Act* (Stats N.S. 1998, c.7 amended R.S.N.S. 1989, c.238, adding sections 21A to 21N) introduced in the wake of a leading decision from the Supreme Court of Canada which enunciates certain constitutional standards in relation to the remuneration and compensation of judges, and the manner in which this is carried out. (*Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re: Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, hereafter cited as the *P.E.I. Judges Reference Case*). Pursuant to the legislation, the Nova Scotia Provincial Judges Association appointed Mr. Ronald A. Pink, Q.C.,. as its nominee to the tribunal. The Minister of Justice, the Honourable Michael Baker, appointed Ms. Terry L. Roane, Q.C. on behalf of the Government of the Province. These nominees agreed upon the nomination of Professor Bruce P. Archibald, from Dalhousie Law School as the Chair of the Tribunal. The tribunal was not finally constituted until late January, 2002 and is under a statutory deadline (being treated as directory by the Government and Association) to present its report and recommendations on or before February 1, 2002. Notice was given to the public through a newspaper advertisement on February 14, 2002 of the fact that hearings would be held on February 23, 2002 in Halifax, with February 20, 2002 as the deadline for the receipt of written submissions. Written submissions were received from the

Judges' Association, the Government and from the general public (two submissions in the latter case). Oral submissions were made by counsel for the Judges' Association, Mr. S. Bruce Outhouse, Q.C. and by Ms. Louise Walsh Poirier on behalf of the Government. Members of the public who made written submissions declined the opportunity to speak to the Tribunal, although they were in attendance, among other interested members of the general public at the hearing on February 23.

The mandate of the tribunal is set out in section 21E(1) of the *Act* which reads as follows:

> 21E (1) A tribunal shall inquire into and prepare a report containing recommendations with respect to
>
> > (a) the appropriate level of salaries to be paid to judges of the Provincial Court and Family Court, including the chief judge and associate chief judge of each court;
> >
> > (b) the appropriate level of *per diem* payments, or payments for part of a day, made to judges for presiding in the Provincial Court or the Family Court where those judges are not receiving salaries;
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> > (c) the appropriate vacation and sick-leave benefits to be provided to judges of the Provincial Court and the Family Court;
> >
> > (d) pension benefits, long-term disability benefits or salary continuation, life insurance and health and dental benefits forjudges of the Provincial Court and the Family Court and the respective contributions of the Province and the judges for such benefits; and
> >
> > (e) other non-discretionary benefits for judges of the Provincial Court and the Family Court.

The reference in subsection 21E(1)(b) to "Payments for part of a day" is an amendment via section 34 of the *Justice Administration Amendment Act*, S.N.S. 2001, S.5 introduced subsequent to the presentation of the first "independent tribunal" dated March 19, 1999.

The Tribunal must take into account in making its recommendations certain factors enumerated

in sub-sections 21E(3)(a) to (j) of the *Act*:

> (a) the constitutional law of Canada;
>
> (b) the need to maintain the independence of the judiciary;
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> (c) the need to attract excellent candidates for appointment as judges;
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> (d) the unique nature of the judges' role;
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> (e) the manner in which salaries and benefits paid to judges in the Province compares to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between those jurisdictions;
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> (f) the provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy;
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> (g) the adequacy of judges' salaries having regard to the cost of living and the growth or decline in real *per capita* income in the Province;
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> (h) the relevant submissions made to the tribunal;
>
> (i) the nature of the jurisdiction and responsibility of the court; and
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> (j) other such factors as the tribunal considers relevant to the matters in issue.

These factors are similar, if not identical, to analogous statutory provisions in other federal, provincial and territorial legislation dealing with judicial compensation in Canada. Virtually all of this legislation was in response to the *P.E.I. Judges Reference Case*. The Judges' Association and the Government provided detailed information in relation to each of these factors, which will be referred to, where relevant, by the Tribunal in addressing each of the issues before it.

The issues raised by the Judges' Association and the Government included: salaries, salary

differentials for Chief and Associate Chief Judges, vacations, per diem payments, pensions, motor vehicle allowances and sickness and disability protection. Each of these issues will be discussed and recommendations made in relation to them by the Tribunal. The submissions of members of the public will be referred to in the conclusions.

B. Salaries

The most difficult, most contentious and most significant issue to be resolved by the Tribunal is the question of Provincial Court and Family Court judges salaries. All of the factors listed in section 21E(3) of the *Provincial Court Act* must be carefully brought to bear on this issue, and resolving the tensions among them is not easy. The present salary of the Judges for the year April 1, 2001 to March 31, 2002 is $144,000. This amount was set by the 1999-2001 Tribunal which reported on March 19, 1999. The task of this Tribunal is to determine what adjustments, if any, are to be recommended in relation to this salary figure for the next three years.

1. Constitutional Requirements for Judicial Independence

The first two statutory factors which this Tribunal must consider in making its recommendations are closely linked and will be considered together: (a) the Constitution of Canada; and (b) the need to maintain the independence of the judiciary. These factors are critical to the maintenance of the rule of law in a free and democratic society, and to the maintenance of a proper balance and division of function among legislative, executive and judicial branches of the state. It is common ground, articulated by the Supreme Court of Canada in the *P.E.I. Judges Reference Case*, that judicial independence has three core characteristics: financial security, security of tenure and administrative independence. Put simply, these characteristics are essential to insure that judges can fulfill their essential role in society free

from temptations of any improper or corrupt economic pressures on the part of public or private interests which could undermine a judge's capacity to render just decisions in accordance with the facts and the law in individual cases. As was the case with the previous Tribunal, we do not believe that Nova Scotia Provincial and Family Court judges can reasonably be thought at risk in terms of constitutionally required independence at salary levels in their present range. Neither the Judges Association or the Government suggested otherwise. However, constitutional requirements for independence, though establishing a conceptual compensation threshold, must be balanced against the other statutorily noted factors in reaching our recommendation on salary.

2. Attracting Excellent Candidates

No one may be appointed to the Provincial or Family Court unless they are a barrister of at least five years standing. This statutory minimum qualification restricts the pool of candidates to a fairly broad group of practising lawyers. However, the statute in section 21E(3)(c) directs the Tribunal to "the need to attract excellent candidates for appointment as judges" (emphasis added). We do not intend to advance an exhaustive definition of what it means to attract "excellent candidates". Nonetheless, we believe it must encompass lawyers of recognised and demonstrated intelligence, skill, ability, experience and sound judgment from diverse backgrounds. As many other Canadian judicial compensation commissions have noted in the past, the compensation package to judges must be attractive enough to induce some of the best practising lawyers to apply. Just as importantly, such commissions or tribunals have recognised that by accepting judicial office, which generally precludes a return to the practice of law, excellent candidates will need assurance that judicial salaries and other benefits will keep pace to a reasonable degree, or at least will not fall unacceptably behind, what they

might have earned in a reputable practice prior to their appointment.

The Judges' Association and the Government presented the Tribunal with publicly available information on earnings of members of the legal profession across Canada, in the Atlantic region and in Nova Scotia. Both sides freely admitted that much of this information was gathered in ways which may have rendered it less than fully comprehensive or reliable, but was of some general assistance to the Tribunal. The best information appeared to be that compiled by Sack, Goldblatt, Mitchell entitled "Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data", dated January 31, 2000 and based on 1997 income tax data (the most current then available). This information was used by the Federal Judicial Compensation and Benefits Commission which reported on May 31, 2000. In reliance on the Sack, Mitchell, Goldblatt and other information from consultants, and in targeting a "comparator population" of private sector lawyers in the 44 to 56 year age bracket who might be thought the primary source for outstanding candidates for Federal judicial appointment, the Federal Commission estimated a 75th percentile income for lawyers in Nova Scotia of $191,000. The Judges' Association pointed to this information, and highlighted the observation that the data was five years old and that other information before the Tribunal could lead to the inference that incomes at the private bar has certainly risen in the interim. The Government provided information that Senior Solicitors in the Department of Justice, for example, on average earn $88,715.00 while Senior Crown counsel with the Public Prosecution Service currently earn $97,029.00. On the other hand, lawyers for the Federal Department of Justice practising in Nova Scotia are known to earn considerably more than their provincial counterparts. In reviewing this and cognate information, counsel for the Judges' Association noted that recruitment to the Provincial Court over the past 20 years had been predominantly from the

ranks of provincial prosecutors and legal aid lawyers with comparable salaries, while the Supreme Court of Nova Scotia federal appointees, with considerably higher salaries (currently in the range of $204,000), were recruited from the private bar, including major law firms in Halifax.

The Tribunal concludes that in order to attract excellent candidates, that is, the best qualified candidates from diverse backgrounds, including appropriate representation from both the private and public bar, some revision upwards from the present salary levels is necessary.

3. The Unique Nature of the Judge's Role

As the brief presented by the Government indicates, the role of judges in the community and their constitutionally protected status, set judges apart from others in society. While judges are public servants, they are not civil servants as are those who work under the direction of the executive branch of government. Thus, while the salaries of senior civil servants are of some interest in making comparisons for setting judges salaries, they are not truly a relevant comparator group, as is implicitly recognised by section 21E(3)(e) of the *Provincial Court Act*, which sees other judges as appropriate comparators. This situation concerning comparators will be referred to in detail below.

Furthermore, the constitutional and legal requirements for judicial independence place upon judges certain economic constraints not normally associated with other occupations. The *Provincial Court Act* stipulates that "[n]o judge shall practise any profession or actively engage in any business, trade or occupation, but shall devote his full time to the performance of his duties as a judge". While a judge can be authorised to act as a "commissioner, arbitrator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding", the *Provincial Court Act* provides that the judge "shall not receive any remuneration therefore". Thus, the judicial salary must be adequate to provide

appropriate compensation where no other economic or professional activity can be engaged in by the judge.

As other judicial compensation commissions have remarked, the judicial role also brings with it a degree of social isolation which is relevant to the compensation issue. Judges must not only be, but be seen to be, impartial and objective. Partisan political activity is obviously out of the question, but other social activities must often be restricted as well, on the grounds that they may be, or be seen to be, incompatible with the judicial role. Furthermore, judges in the post-modern world have serious concerns about personal security for themselves and for their families which impact upon the way in which they conduct their daily personal life. Judges are not, and should not become, hermits. On the other hand, the unique role of the judge requires a degree of circumspection in relation to ordinary social and personal life which is appropriately recognised in salary considerations.

4. Judicial Compensation Packages in Canadian Comparator Jurisdictions and the Nature and Responsibility of the Jurisdictions

Section 21E(3)(e) explicitly directs this Tribunal to consider ... "the manner in which salaries and benefits paid to judges in the Province compares to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between [sic] those jurisdictions". It is significant that the federal jurisdiction is among the comparators since, historically, federally appointed judges have earned salaries considerably above those earned by provincially appointed judges across the country. As mentioned above, federally appointed trial and appellate court judges (excluding those of the Supreme Court of Canada or Chief and Associate Chief Judges) currently earn $204,400.00, which creates a significant gap by comparison to Nova Scotia

Provincial and Family Court judges who earn $144,000. The potential gap must be assessed in the light of the fact that in 2002 the regular federally appointed judges' salary will likely increase to a figure in excess of $210,000, based on a $2,000.00 increase over the previous year along with statutory indexing using the Industrial Aggregate Wage Index. (See Recommendation 1 of the 2000 Federal Commission, *supra*, and the document Compensation 2001/Rémunération 2001, prepared by the Canadian Association of Provincial Court Judges in the Fall of 2001).

Needless to say, the Judges' Association places considerable emphasis on the gap between the federally and Nova Scotia provincially appointed judges, and in particular, have put some emphasis on the recommendation of the 1998 Nova Scotia Tribunal which seems to rely in part upon *de facto* benchmark of the 1991 salary gap between federally appointed and Nova Scotia appointed judges of $47,200. If this benchmark for an appropriate federal/Nova Scotia gap were to be used, it would put Nova Scotia salaries in the $163,000 range for 2002. Even more attractive to the Judges' Association was the suggestion, made by Dean William Charles in the Report of his 1982 inquiry into the salaries of Nova Scotia Provincial and Family Court Judges, that a "useful and reasonable standard and guideline" would be to pay Nova Scotia appointed judges 85% of the salary of the then federally appointed County Court judges. An 85% figure in relation to the proposed salary for federally appointed judges in 2002, would give Nova Scotia appointed judges a salary for 2002 in the range of $179,000. Another proposed "gap calculation" from the Judges' Association, in the middle of the previous two figures, was based on the difference between the average recommendation of six recent provincial judicial compensation commissions and the proposed federal salary for 2002. This would provide for a "gap" in the range of $42,000 and a resulting 2002 salary for Nova Scotia provincial appointees in the range of

$168,000.

The federal/provincial comparison which is mandated by section 21E(3)(e) of the *Provincial Court Act* has also been addressed by other provincial judicial compensation tribunals across the country. However, these comparisons also raise questions in relation to the comparative factor mentioned in section 21E(3)(i) of the *Act*: "the nature of the jurisdiction and responsibility of the court". At its highest, provincial court judges arguing before other tribunals have advocated parity between federally and provincially appointed judges in so far as salaries are concerned. As the 1991 Manitoba Commission stated:

> "The most compelling argument in favour of parity is the role and function of Provincial Judges. It is difficult to underestimate the importance of their task. Arguably, their role is just as important in our society as that of federally appointed judges. The Provincial Court deals primarily with rights of persons and questions of liberty, whereas Superior Courts, to a significant extent, deal with questions of property. Contained in a report such as this, concepts such as 'liberty' and 'rights of the persons' are rather antiseptic. In reality, however, the consequences of many of the day to day decisions of Provincial Judges to individual citizens cannot be minimized. The need for persons with judicial temperaments, who have the necessary legal skills and the ability to administer justice carefully and appropriately is no less pressing in the Provincial Court than in any other court" (emphasis omitted)

This parity argument, particularly in Nova Scotia at the present time, has been etched in the conscience of all concerned by the creation of the Family Division of the Supreme Court of Nova Scotia. Seven judges of the provincially appointed Family Court of Nova Scotia were "elevated" to the federally appointed Family Division of the Supreme Court to provide a "unified" service for virtually all family related issues: divorce, matrimonial property, adoption, custody, guardianship, family maintenance and

family welfare or child protection related issues etc. However, this new unified family division serves only the Halifax and the Sydney regions. In the rest of the Province, Provincial Family Court judges handle maintenance, custody and family welfare or child protection issues as they always have done, and even handle some of the "federal judge issues" on a local reference-judge basis. Moreover, we are told by the Judges' Association, without objection, that much of the work of the Family Division of the Supreme Court is in the area formerly covered by such judges when they were in the Provincial Family Court. In other words, provincially appointed judges of the Provincial Family Court are doing very similar work to their "elevated" former colleagues in the Supreme Court Family Division but are currently being paid $60,000 a year less. The 1998 judicial compensation commission in Ontario described an analogous situation as "one of pure happenstance" which could not be justified (pp. 46-47).

Counsel for the Government was quick to point out, as was acknowledged by counsel for the Judges' Association, that no provincial judicial compensation commission, let alone a provincial government, has accepted the federal/provincial full parity argument. There are significant salary disparities between provincial and federal judicial appointees in all provinces. However, the disparity in Nova Scotia is greater than in many other provinces. Here the Judges' Association once again points to the views of the 1998 Ontario Tribunal Report (pp. 43-44):

> "In considering the salaries of the federal judges as extremely relevant, we are mindful of the writings of Professor Peter Russell, the leading scholar of the Canadian Courts. Russell has noted that the differential treatment of federal and provincial judges promotes the perception of a two-level system of justice. To paraphrase Russell, this may well have been tolerable when the provincial courts dealt with minor matters. It is not tolerable, however, when those courts are vested with jurisdiction

> over the most vital matters between citizen and the state - the criminal law."

The Government acknowledges the fact that, although this Tribunal must consider the federal jurisdiction as one of its comparators, the Government points out that the Tribunal is to do so "... having regard to the differences between those jurisdictions". The Government had earlier pointed out that "... Nova Scotia depends on transfer payments and equalization payments paid by the federal government" and that this "... makes the point of the federal-provincial distinction clearly".

This Tribunal is aware that, while it must take into account federal judicial salaries, a recommendation for full parity is simply out of the question in present circumstances, and would fail to take into account important factors to be discussed below. Nonetheless, given the Provincial Court Judges' onerous criminal jurisdiction responsibilities, and the Family Court judges' comparative circumstances in relation to judges of the Supreme Court Family Division, the reduction of the federal/provincial gap to some degree is an appropriate consideration in setting salaries in this exercise.

Both the Judges' Association and the Government provided us with information about salaries and the recommendations of judicial compensation tribunals in other provinces and territories. The Tribunal was gratified that both sides were able, for the most part, to agree on the basic information in question, while understandably using this same information differently in relation to their submissions. The presentation and interpretation of such information is,

however, made difficult by the facts that judicial compensation commission recommendations for the comparable period to this Tribunal's mandate are pending for Manitoba, Ontario, Prince Edward Island and the Yukon, and that government responses in Alberta, British Columbia, Quebec, Manitoba,

New Brunswick, Newfoundland and Ontario are, have been, or may be, the subject of litigation by judges' associations claiming that government responses are constitutionally inadequate: see *Provincial Court Judges' Assoc. of British Columbia* v. *British Columbia (Attorney General)*, (1998) 160 D.L.R. (4th) 477 (B.C.C.A.) leave to appeal to S.C.C. dismissed (1999), 236 N.R. 185 (upholding the judges association); *Alberta* v. *Alberta Provincial Judges Association* (1999) 177 D.L.R. (4th) 418 (Alta. C.A.) leave to appeal to S.C.C. dismissed, 2000, 258 N.R. 194 (upholding the Judges' Association); *Newfoundland Association of Provincial Court Judges* v. *Newfoundland* (2000), 191 D.L.R. (4th) 225 (Nfld. C.A.) (upholding the Judges' Association); *Conference des juges du Quebec c. Quebec/Procureure générale* [2000] J.Q. No. 3772 (Que. C.A.) (upholding the Judges' Association); *The Judges of the Provincial Court of Manitoba* v. *The Queen et al.*, 2001 MBQB 191 (Man. Q.B.) (upholding the Judges' Association in large measure); and *Ontario Judges' Association* v. *Ontario (Chair, Management Board)* [2002] O.J. No 533 (upholding the Government's position in refusing to implement a commission's recommendations on pension).

From the information presented to the Tribunal by the Government (which differs slightly from the way this information was treated and presented by the Judges' Association), it is possible to generally summarize the Canadian provincial/territorial salary data as follows:

Province	Current Salary	Judicial Compensation Commission's Recommended Salary (2002)
British Columbia	$158,000	$158,000
Alberta	$170,000	$170,000
Saskatchewan	$143,000	$143,000
Manitoba	$112,000	(Pending)
Ontario	$175,999	(Pending)
Quebec	$148,320	$186,368
New Brunswick	$141,206	$169,805
Prince Edward Island	$150,011	(Pending)
Newfoundland	$139,900	$156,060
Yukon	$141,700	(Pending)
Northwest Territories	$174,000	$176,784
Averages	$149,844	$157, 477 (using current salary where recommendations pending)

Using the information in the above Table, one can see that the current average provincial judicial salary ($149,844) is well above the current Nova Scotian provincial judicial salary of $144,000, and that the average recommended salary ($157,477) is even more so. It must be remembered that the last figure is misleading, and quite conservatively so, since it uses "actual" figures where Commission recommendations are pending. Even the "current" figure is conservative in that it includes the $112,000 for figure Manitoba which was set for 1998 and will be the subject of retroactive adjustment following the litigation there. Similarly, the Quebec, New Brunswick and Newfoundland "current" figures will in

all likelihood be the subject of upward revision in the light of litigation and/or continuing discussions.

The Tribunal concludes that in the light of the foregoing information, the Nova Scotia Provincial and Family Court judges' salaries at $144,000 deserve to be adjusted upward by reference to current salaries and pending salary revisions in the other provinces and territories. Having regard to the differences among those jurisdictions, it is not appropriate that Nova Scotia salaries suddenly jump to the high end of the scale, nor that they be at the very bottom. It is to be noted that the approach in Saskatchewan and Prince Edward Island is to set salaries by references to the "national provincial average", and in Manitoba to do so by reference to judicial salaries in Nova Scotia, New Brunswick and Saskatchewan.

5. Prevailing Economic Conditions, the Overall State of the Provincial Economy, the Cost of Living and Per Capita Income in the Province

Economic indicators, and their appropriate impact on provincially appointed judges' salaries, are a serious matter of concern for this Tribunal. We are directed in *Provincial Court Act* section 21E(3)(f) to consider when making our recommendations "the provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy". Moreover, section 21E(3)(g) requires us to consider "the adequacy of judges salaries having regard to the cost of living and the growth or decline real *per capita* income in the Province". The Government provided the Tribunal with comparative information on past and present economic conditions including GDP growth, employment growth, the unemployment rate, retail sales, inflation and housing starts. It also provided comparative data on GDP per capita figures and a ratio of judges salaries to GDP per capita which indicated that Nova Scotia had one of the highest

ratios in the country (although the ratio of judges per capita is not that high). In addition, the Tribunal was provided with comparative information on Nova Scotia average weekly wages and salaries, and Nova Scotia family incomes. Finally, the Government provided information concerning the provincial debt and the importance of coping with the debt and eliminating government budget deficits. All of this the Tribunal reviewed carefully.

The Government correctly asserts that the prevailing economic climate in Nova Scotia mandates continued prudent and restrained spending of tax dollars. The Province has the highest provincial debt per capita in Canada, and counsel for the Government drew the Tribunal's attention to the effects of the *Financial Measures (2000) Act* which amended sections 76 to 78 of the *Provincial Finance Act*, and, in essence, require the Minister of Finance to present a balanced budget. The Tribunal was also given information about the potential impact of budget deficits on the Provinces' credit rating, and the negative effects of any reduction in that rating. The Government concluded its submissions in the following manner:

> "It is submitted the foregoing economic and fiscal realities do not support an increase in judicial salaries at this time, beyond a cost of living increase equivalent to the CPI (N.S.) On April 1st in each of the years under the Tribunal's mandate: 2002, 2003, 2004. This is consistent with the recognition by APEC [the Atlantic Provinces Economic Council, publisher of materials submitted to the Tribunal] and the Conference Board of Canada [also publisher of materials reviewed by the Tribunal] of the downward pressures on salaries exerted by existing economic uncertainties and the problem of balancing budgets. The downward impact on spending exerted by the debt load of the Province is also clear. Nova Scotia incomes are not high compared to judicial salaries".

The Tribunal very much appreciates the sentiments and analysis underlying these submissions.

The Judges' Association pointed to different information and made different submissions from those of the Government. The Association submitted that the Tribunal should focus on the state of the economy itself and not to place weight on how the Government has decided to allocate its resources based on its political and fiscal priorities. (Indeed, the Tribunal notes that unlike some other analogous provincial legislation in other provinces, section 21E(3) does not mention explicitly that fiscal capacity of Government as a relevant factor for consideration, although the Tribunal takes this to be an aspect of "the overall state of the Provincial economy".) The Judges' Association asserts, citing positions taken by other provincial judicial compensation commissions, that "...economic considerations must be a secondary consideration to the need to set salaries at sufficiently generous levels to protect and promote judicial independence even if this results in some financial discomfiture for governments". But the Judges' submission then links this broad assertion to economic prognostications from the "TD Economics Provincial Economic Outlook Report" of December 20, 2001 and other analyses which are more optimistic than the economic analyses relied upon by the Government in this context. The Judges' Association concludes in relation to the economic situation that the Tribunal "...should not let temporary economic setbacks distort the fact that the overall economic outlook for the province in the next few years looks bright". The Judges' Association also noted that the Government is economically capable of paying salaries to certain categories of public servants and professionals in the education and health care sectors which are not out of line with the kinds of proposals it is advancing.

As to the issue of the "adequacy of judges" salaries having regard to the cost of living and the growth or decline in real per capita income in the Province", the Judges' Association notes that Statistics Canada data demonstrates that personal income has increased in Canada and Nova Scotia

for every year from 1990 to 2000. On the technical side, the Judges' Association prefers to rely on the Industrial Aggregate Index, or IAI, rather than the Consumer Price Index (C.P.I.), for a measure of the cost of living, as has been done by the Federal Commission. The IAI has risen more in percentage terms than the C.P.I. for comparable periods since the report of the last Nova Scotia judicial salary tribunal.

The Tribunal's conclusions in relation to the two factors represented by section 21E(3)(f) and (g) are that while the economic and cost of living issues form a significant constraint upon our salary recommendations, the positions taken by the Judges' Association and the Government, respectively, do not square entirely with the Tribunal's statutory mandate. To suggest, as does the Judges' Association, that "economic considerations must be secondary" is to overstate the case. Similarly, when the Government concludes "...economic and fiscal realities do not support an increase in judicial salaries at this time beyond a cost of living increase equivalent to the C.P.I. (N.S.)", it is inviting the Tribunal to place excessive reliance on these economic and cost of living factors. The Tribunal has the statutory obligation to balance *all* of the factors in section 21E(3) of the *Provincial Court Act*, and not to put undue weight on some to the exclusion or the undervaluing of others. The Tribunal is very conscious of the economic and cost of living issues and is "factoring them into the mix".

6. Conclusions on Salary

The Tribunal is conscious of the fact that, as submitted by the Government, one cannot determine the salary issue in isolation from the complete compensation package, and in particular the pension component. Pensions have been dealt with below in accordance with the agreement reached by the Judges' Association and the Government on that topic. However, weighing all of the factors

mentioned in *Provincial Court Act* section 21E(3), and in the light of the other aspects of the compensation package contained in the subsequent recommendations of this Report, the Tribunal recommends as follows with respect to salaries:

Recommendation 1:

Based on the evidence presented and the ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal recommends that salaries for Provincial Court and Family Court judges be as follows:

(a) commencing April 1, 2002, the sum of $157,000.00
(b) commencing April 1, 2003, the sum of $160,140.00
(c) commencing April 1, 2004, the sum of $163,342.00

Comment:

Without wishing to alter or revise any of the preceding general analysis, the Tribunal makes the following observations on the recommended salary structure for the upcoming three years. Firstly, the starting amount of $157,000 reinforces the principle of judicial independence, recognises the unique role of judges, and upholds the constitutional values identified in the *P.E.I. Judges Reference Case*. Secondly, it addresses the need to attract excellent candidates from a diverse pool of candidates in the public and private practising bar. Thirdly, it compares appropriately with present and recommended judicial salaries in other jurisdictions, taking into account differences among them, by reflecting a compromise which is reasonable in the circumstances. Fourthly, the starting position for 2002 makes a modest attempt to address the gap between the federal and provincial appointees (reducing it from $60,000 to $53,000), while remaining within the range which the Province is capable of paying to a small number of unique public servants (31) without justifying demands for similar increases across the civil service. Finally, we note that the increases for years two and three are based on an estimate of

probable cost of living increases at 2%. Future tribunals might wish to incorporate reference in their recommendations to the Consumer Price Index, the Industrial Aggregate Index or some other scientific tool for the reflection of cost of living increases. However, given the fact that in its submissions the Government favoured the C.P.I. while the Judges' Association favoured the IAI, and neither side presented full scientific analysis as to why one should be favoured over the other, we have adopted 2% as an adequate, fair and reasonable substitute in the circumstances.

C. Differentials for Chief and Associate Chief Justices

Currently the Chief Judge of the Provincial Court and Chief Judge of the Family Court are each paid a differential of $10,000 in addition to their regular salary in order to compensate them for their extra administrative duties and responsibilities. The Associate Chief Judge of the Provincial Court receives a differential of $5,000. In submissions made by the Chief Judges and passed directly by the Judges' Association to the Tribunal, the duties of the Chief and Associate Chief Judges are described as follows:

> Holders of these positions discharge their various extra obligations, and share them, in the case of the Provincial Court, continuously. The Associate Chief Judge must be prepared to step in the Chief Judge's place at any time; more importantly Associate Chief Judge Gibson and I consult widely, nearly daily. Additionally, the Associate Chief Judge has assumed the responsibility for Justice of the Peace, a particularly onerous duty in the last few months, given the restructuring of that office. Further, the Associate Chief Judge is a member of most committees on which the Chief Judge is required to participate and attends all meetings with the Chief that are itemized below with reference to administrative duties.
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> The administrative duties are very general. Chiefs represent their courts and meet with numerous people, including members of the Executive Branch, on a regular basis. They secure funding, approve and prioritize

> expenses where budgets are limited, including attendances at educational conferences; appoint Supernumary Judges (per diem), assign judges to various courts (21 Provincial Court Judges, to look after 39 courtrooms in 27 locations), a particularly challenging task in cases of illness; act on various committees created by the Executive, by the Chiefs in Nova Scotia, or the Chiefs in Canada, or those created for their respective Benches; prepare agenda, organize and conduct meetings of the Bench. Above all, they are responsible for the administrative affairs of the Bench, from providing furnishings and computers, to dealing with staff shortages and lack of services, so that each judge can devote his or her own full-time to the discharge of his or her judicial duties, that is to say, to hear and decide cases within reasonable delays.
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> When the differential was set a number of years ago the Chiefs at that time did not have a regular Court docket. It was only when the present Chiefs were appointed that they kept their regular docket because of a shortage of Judges. As a result the present Chiefs dedicate many more hours to a combination of Court work and Chiefs' administrative duties than was the practice in the past.
>
> One duty, unique to Chiefs appointed by the Province, is the handling of complaints against Judges of their Court, in accordance with the statutory requirements. It must be done thoroughly and discreetly; it may affect the workings of the Court; it must recognize the independence of the Judge complained of, and the genuineness of the complaint; any dismissal of such complaint is done with reason, in light of the record; otherwise the matter is referred to the Judicial Council.
>
> Other duties are imposed by Statute or Regulation, such as the management and discipline of Justice of the Peace (there are now about 200 *inside* (within Justice Centers) and *outside* JPs; the number of outside JPs will be reduced on the 31st of March, when a new system comes into effect); or the appointment of Chairperson to Human Rights Boards.

Unfortunately, there is little quantitative information attached to the foregoing description of the administrative responsibilities of the Chief and Associate Chief judges. It would have been helpful to the Tribunal to have a fuller account of the nature of this work, and a breakdown of the time spent in

various administrative duties as opposed to regular judicial work.

The following Table presents comparative information culled from both Government and Judges' Association submissions on the salary differentials for Chief and Associate Chief Judges for other provinces and territories across Canada.

Chief and Associate Chief Judge Salary Differentials
Summary of Information

JURISDICTION	NUMBER OF JUDGES	NUMBER OF CHIEF AND ASSOCIATE CHIEF JUDGES	CURRENT DIFFERENTIAL	
			CHIEF	ASSOCIATE
British Columbia	145		$10,000	$5,000
Alberta	109		$15,000	$7,500
Saskatchewan	47	one Associate Judge	$10,000	$5,000
Manitoba	39	one Chief Judges, two Associate Chief Judges	$10,000	$3,000
Ontario	255		$32,700	$27,200
Quebec	270		$23,337	$19,699
New Brunswick	25	One Chief Judge, one Associate Chief Judge	$10,000	$5,000
Prince Edward Island	3	Chief Judge	$5,000	
Newfoundland	24	Newfoundland does not have an Associate Chief Judge, but does have a Senior Coordinating Judge for the St. John's Court (an additional 3% salary).	($6,720)	($3,720)
Yukon	3	No Assistant/Associate judges	($7,000)	($3,500)

Northwest Territories	3	Chief Judge	$12,500	

The figures in parentheses for Newfoundland are based on Commission recommendations of 6% and 3% for Chief Judge and Co-ordinating Judge respectively which have not yet been implemented. The figures in parentheses for the Yukon are based on government accepted Commission recommendations for Chief Judge and Supervisory Judges, which positions are currently held by a single incumbent.

The Judges Association submits that the differentials to be paid to Chief and Associate Chief Judges should be in identical amounts. Moreover, it submits that this amount should be calculated at 8% of the yearly salary of a regular judge, which it asserts, was the principle underlying the introduction of the $10,000 figure at the outset - a principle which it says has been lost over time, as regular salaries have gone up and the differential has stayed the same. Finally, the Judges' Association submits that the Chief and Associate Chief judges salaries ought to be "red-circled", in the sense that Chiefs or Associate Chiefs who relinquish their special office ought to continue to have their differential structured into their salary package. The Government submission was that the current salary differentials should remain unchanged, and that "red-circling" ought not to be adopted.

The Tribunal is not favourably disposed to the red-circling argument. Submissions on this point were not detailed, and the proposition seems intuitively counter to the principle that the differential is paid for additional duties and responsibilities, and should no longer be paid when these cease. However, that issue need not be canvassed in detail given our general conclusions on the differential issue. The current differentials of $10,000 and $5,000 are reflected in the salary structures of many

provinces, including some with more judges and higher base salaries. Other jurisdictions have smaller differentials. In this context, the present differentials do not seem to be out of line. It may be that a subsequent Tribunal with more detailed empirical data as to the activities of the Chief and Associate Chief judges, both here and in comparator jurisdictions, could come to a different conclusion. However, in the light of the factors which we must take into account under the governing legislation and the information with which we have been provided, we are not prepared to recommend any change from the current situation.

Recommendation 2:

Based on the evidence presented and the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal recommends that for the period commencing April 1, 2002 and continuing for the effective term of this Tribunal's recommendations,

> **(a) the Chief Judges of the Provincial and Family Court receive $10,000 per annum in addition to their regular salary; and**
>
> **(b) the Associate Chief Judge of the Provincial Court receive an amount of $5,000 per annum in addition to the regular judicial salary.**

D. Vacations

The current vacation entitlement of provincially appointed judges in Nova Scotia is 5 weeks or the equivalent of 25 working days, commencing upon appointment. The Government provided the following Table with respect to comparative vacation entitlements of judges across Canada.

VACATION	
BRITISH COLUMBIA	(Not addressed by Commission) Currently **30 days**; 5 days can be banked per year to a maximum of 30 days
ALBERTA	(Not addressed by Commission) Currently: **30 days** to be used within 24 months

SASKATCHEWAN	**30 days** (Commission rejected Judges' request to increase vacation to 40 days)
MANITOBA	**20 days increasing to 25 days, upon 10 years government service and further increasing to 30 days with 20 years government service** (most Provincial Court Judges in Manitoba have 10 prior years government and thus start at 25 days, because they are appointed from Legal Aid or the Crown Prosecution Service (CAPCJ indicate 25 days, increasing to 30 days with 20 years prior government service
ONTARIO	8 weeks (**40 days**): Commission recommendation Binding
QUEBEC	**30 days** (CAPCJ Table)
NEW BRUNSWICK	**Current vacation is 20 days, increasing to 25 days after 14 years service. Commission recommended 30 days and government rejected**, proposing vacation be discussed by the Chief Judge and Department of Justice and report made to government.
NOVA SCOTIA	**25 days**
PRINCE EDWARD ISLAND	**15 days increasing to 20 days after 6 years' service and further increasing to 25 days after 16 years service and 30 days after 26 years' service** (Judges have requested additional 5 days before 2001 Commission - Report pending)
NEWFOUNDLAND	Commission recommended and government accepted: **25 days**, accumulated to a maximum 60 days, administered and approved by Chief Judge. (Note: Recommendation enhances vacation which was 35 days, but that was the combined entitlement for sick leave and vacation. Now Sick Leave is separate from vacation).
YUKON	**30 days**
NORTHWEST TERRITORIES	**31 ½ days** (2.625 days/month)
FEDERAL	8 weeks

The Government also noted in its submission that unlike provincially appointed judges in Nova Scotia, civil servants and other public servants generally receive only three weeks vacation upon commencement of employment, and gradually work up to six weeks.

The Judges' Association submitted that provincially appointed judges in Nova Scotia should receive six weeks of vacation. This was on the theory that it would be more commensurate with judicial vacation entitlements across the country, and more importantly would relieve the increased work load, case-complexity and stress with which current provincially appointed judges must currently cope. The Government countered that present judicial entitlements are fair and reasonable, but more importantly that at present rates for per diem replacement ($580.65) an additional week's vacation (5 days for 31 judges) would cost $90,000 - which the Government can ill afford. The Tribunal can appreciate the perspectives from which both submissions are presented, but our recommendations differ from both.

Recommendation 3:

Based on the evidence presented and the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal recommends that for the period commencing April 1, 2002 and continuing for the effective term of this Tribunal's recommendations:

> **(a) Upon appointment and during their first five years of service on the bench, judges of the Provincial and Family Court receive 5 weeks of paid vacation annually;**
>
> **(b) Provincial Court and Family Court judges with more than 5 years of service receive 6 weeks of paid vacation annually; and**
>
> **(c) Paragraphs (a) and (b) apply to judges currently appointed as of the date of their initial appointment.**

E. Per Diem Payments

Retired or "supernumerary" judges are from time to time requested to sit as judges when regular judges are unavailable. These judges are paid a daily rate or *per diem*. The $300.00 rate set by the 1988-89 Tribunal in Nova Scotia was altered to 1/248 of a judge's annual salary after the recommendations of the 1998 Tribunal. This currently works out to a per diem of $580.65 based on an

annual salary of $144,000. The denominator presumably represents a deduction of 104 Saturdays and Sundays from a leap year of 366 days as well as subtracting 12 days for statutory holidays. This would be the number of working days of a full time judge who took no holidays.

The Government provided a summary of per diem arrangements for provincial court and territorial court judges across Canada. That Table reads as follows:

PER DIEM: INTER-JURISDICTIONAL COMPARISONS PROVINCE	
BRITISH COLUMBIA	Commission recommended; government accepted per diem rate; **.8 x full salary** **180** **½ day per diem**
ALBERTA	Commission recommends and government accepts: calculate per diem at 1/261 (number of working days in one year plus 16% thereof in recognition that per diem judges receive no statutory holiday pay, sick leave or health benefits) = **1/224 full salary. ½ day per diem (calculated at ½).**
SASKATCHEWAN	Commission recommended, government accepted: **$600/day;** **½ day per diem - $300**
MANITOBA	**No per diem** or ½ day per diem rates in Manitoba. (Haven't needed extra judicial assistance over the past 5 years but could call up "Acting Judges" if they were needed, and they would be paid based on biweekly rate of a Judge).
ONTARIO	**Per diem: 1 x full salary** **210 (i.e. the court year)** Currently effective April, 2001 - $838.09 **No ½ day per diem**
QUEBEC	
NEW BRUNSWICK	(Not addressed by Commission); Formula set out by Regulation: **1/251 x full salary; ½ day per diem**
PRINCE EDWARD ISLAND	**1 x full salary** (Currently $655.98/day) **220** **½ day per diem**
NOVA SCOTIA	**1/248 x full salary;** **no ½ day per diem** (Act now authorizes Commission to set ½ day per diem)

NEWFOUNDLAND	(Not addressed by Commission) Informed **no per diem rate** (no part-time or supernumerary judges)
YUKON	Commission recommended and government accepted **$500 per diem** **No ½ day per diem** (Judges are flown in for a minimum of one week from other jurisdictions).
NORTHWEST TERRITORIES	**1 x full salary (50% for non-sitting days);** **210** **No ½ day per diem** (Judges are flown in and are there for days at a time before flying out).

It can be seen that there are a variety of approaches to the problem where it exists, and that some jurisdictions avoid the issue by not having per diem judges.

The Government submitted that the present per diem rate of 1/248 of full time salary be maintained, and that the Tribunal set a half-day per diem to be applicable whenever a part-time or supernumerary judge assigned to a court were to sit for a half-day or less. The Government argued the fairness of its position with the propositions (a) that per diem judges are retired and already receiving pensions, (b) there is no justification for paying a full day per diem for simply taking a plea, adjourning a matter or hearing a short trial, and (c) the rate of 1/248 is fair in relation to per diem rates of other jurisdictions.

The Judges' Association requested that the Tribunal increase the per diem rate to 1/224 of full salary, on the theory one should deduct 104 days for Saturdays and Sundays, 12 days for statutory holidays and 25 days for vacation in order to calculate the fractional worth of a day's judging at the going salary. The Judges' Association advanced a number of objections to half day per diem payments from six retired judge members who have sat as per diems: (1) per diem judges are available to cover for emergencies, illness, disability, vacations and conflicts (doing so last year for 141 days at a cost of

$153,000); (2) per diem judges exercise the same jurisdiction, duties and responsibilities as salaried judges; (3) without per diem judges, docket delays would increase (presently in the range of six to nine months) and cases would constitutionally be dismissed due to institutional delay and overworked salaried judges; (4) per diem judges are economical, since the Government need not pay for secretaries, officers, salary related benefits or provide significant incidental allowances; (5) per diem judges are paid for court time only, not for preparation, writing judgments or keeping up with changes in the law; and (6) per diem judges often change plans and make arrangements to sit for a full day, even if the docket collapses, and they should be compensated for this on an opportunity cost basis. The Judges' Association concluded on the strength of these reasons that half day per diems should not be set by this Tribunal, noting that only British Columbia, Alberta, Saskatchewan and New Brunswick have half day per diem rates. In the alternative, the Judges' Association argued that a half day per diem should only be paid where the judge agreed in advance to sit for a half day or less, and not where a planned full day collapses. Finally, the Judges' Association completed its alternative submission by saying that the "partial" per diem be set at 70% of the full day rate rather than 50%.

The Tribunal recognises the importance, under present circumstances, of per diem judges and is concerned to set a fair rate based on a rational principle. The starting principle must be that per diem judges are entitled to be compensated at a level which reflects the current worth of a day's judging, and to be paid in relation to the work which they actually do, balanced by some appreciation of the opportunity cost notion. All things considered, the Tribunal concludes that, assuming a minimum five weeks vacation, the per diem should in principle be set at 1/224 of full salary. However, this is a significant change which should be phased in over three years. On the half day per diem issue, the

Tribunal agrees with the Government that setting a half day per diem at the 50% rate is appropriate. However, the half day rate should only be applicable where the per diem judge commits in advance to sit only for a half day or less. Where the judge is called in for a full day, and the docket collapses or the work terminates early for reasons over which he or she has no control, the judge is entitled to a full per diem payment.

Recommendation 4:

Based on the evidence presented and the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal recommends:

> **(a) That the full per diem rate for the year commencing April 1, 2002 be 1/248 of full salary for that year;**
>
> **(b) That the full per diem rate for the year commencing April 1, 2003 be 1/236 of full salary for that year;**
>
> **(c) That the full per diem rate for the year commencing April 1, 2004 be 1/224 of full salary for that year;**
>
> **(d) That judges scheduled to sit for a half day or less receive 50% of the applicable full per diem set out in paragraphs (a), (b) or (c), but that a judge scheduled to sit for more than half a day shall receive the full day per diem rate regardless of how early the court is adjourned on that day; and**
>
> **(e) That per diem judges shall normally have at least 24 hours notice with respect to the arrangements described in paragraph (d).**

F. Pensions

The Government and the Judges' Association have been negotiating for some time concerning new pension arrangements. A description of the proposed pension plan prepared by the Department of Finance Pension Services Group was circulated to the Tribunal on February 21, 2002. Final agreement was reached on this matter on March 6, 2002 following the Tribunal's hearing. This final agreement

was forwarded to the Tribunal, and we have reviewed it in the light of the statutory factors we must consider prior to making recommendations. We conclude the Pension Agreement found as Appendix A to this Report meets the statutory requirements and we are pleased to approve it.

Recommendation 5:

Based on the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal recommends that the Pension Plan set out in Appendix A to this Report be implemented to come in force as of April 1, 2002.

G. Travel Compensation

Currently the Government reimburses provincially appointed judges using their own vehicles for work related travel. The Association is seeking an improvement in the applicable mileage rate as a Tribunal recommendation. However, the Government disputes whether such a recommendation is within the Tribunal's jurisdiction. Section 21E(1), quoted earlier, requires the Tribunal to prepare a report containing recommendations on (a) salaries, (b) per diems, (c) vacation and sick leave benefits, (d) pension benefits, long-term disability benefits, life insurance and health and dental benefits, and (e) "other non-discretionary benefits for judges of the Provincial and the Family Court". The Government now takes the position "that mileage is not a non-discretionary benefit within the jurisdiction of the Tribunal under section 21E(1) (it is neither non-discretionary nor a benefit, being reimbursement for an expense". The Judges' Association responds as follows to that argument from the Government:

> While not specifically listed in s.21E(1) of the **Provincial Court Act**, it is perfectly clear that provincially appointed judges are required to travel about the province in order to carry out their duties and they are required to use their own vehicles for this purpose. Consequently, the Government is obliged to reimburse the judges for such use and it in fact does so. T he only issue is the rate of reimbursement. Accordingly,

> the Association submits that reimbursement is not a discretionary benefit. If it was, then the judges' salaries could effectively be eroded by the Government's failure to reimburse them for expenses which they are required to incur in order to perform their assigned duties.

This jurisdiction question must be clarified before we proceed further on the substance of the issue.

The Tribunal is of the view that it has, of necessity, the initial jurisdiction to determine the question of what is a "non-discretionary benefit" under section 21E(1)(e) of the *Provincial Court Act*, subject to the jurisdiction of the Court of Appeal in this regard pursuant to section 21E(2) of the *Act*. That section reads:

> "Where there is a dispute as to whether a benefit referred to in clause (e) of subsection (1) is a non-discretionary benefit, the Minister or the Association may, within thirty days of receipt of the report, appeal to the Nova Scotia Court of Appeal to have the question determined".

The reference to "the report" in that subsection is to the Tribunal's report to the Minister making recommendations on the compensation issues under section 21E(1), and the Court of Appeal's jurisdiction pre-supposes a disputed Tribunal recommendation, or disputed Tribunal ruling excluding a recommendation, on the question of what is or is not a "discretionary benefit" for the purposes of section 21E(1).

The Tribunal has concluded that travel compensation in the sense of mileage for vehicle use, or a functional equivalent thereof, is a "non-discretionary benefit" in relation to which it may make a recommendation to the Minister under section 21E(1) of the *Act*. As the Government indicates, the mileage allowance reimburses a judge for the expenses incurred through the use of his or her own car on judicial business. However, by doing this, reimbursement "makes good" the judge's loss in

accordance with the original Latin roots of the word benefit - *bene facere*. This is surely to compensate the judge for a mandatory aspect of his or her duties. When the Chief Judge assigns a judge to a particular court, other than his or her normal place of work, he or she must travel there, and to this point the Government has not laid on the transport. Unlike the Lieutenant Governor, judges are not provided with a chauffeur driven limousine - they must drive their own cars. This is not discretionary - and the reimbursement must be seen as a non-discretionary benefit. Failure to reimburse or provide the benefit would necessarily be an arbitrary reduction in a judge's net income based on random work assignment. This is an aspect of the "judicial compensation package" referred to in section 21E(3)(c) of the *Act*. The Tribunal finds that mileage or reimbursement for work related mandatory travel is a non-discretionary benefit within the meaning of section 21E(1)(e) of the *Act*. We note that in a like manner the 1998 Manitoba Judicial Compensation Committee made recommendations on parking, the 2001 Newfoundland Tribunal made recommendations on car allowances (mileage), and the 2001 Quebec Comité de rémunération des juges made a recommendation on mileage expenses (No. 4).

As to the substance of the mileage issue, the present reimbursement policy for judges is 31.5¢ per km. for the first 16,093 kms., 29¢ per km. for the next 8,047 kms. and 19.4¢ per km. for each kilometre thereafter. The following Table, from information provided by both the Government and the Judges' Association, summarizes the mileage rates for provincial and territorial court judges across the country.

MILEAGE INFORMATION SUMMARY

JURISDICTION	MILEAGE
British Columbia	$0.40/km
Alberta	$0.33/km
Saskatchewan	$0.3410/km
Manitoba	south: $0.34/km first 10,000 km, $0.2575 thereafter north: $0.386/km first 10,000, $.305 thereafter
Ontario	south: $0.30/km north: $0.305/km
Quebec	first 8000 km=$0.37/km 8000+ -$0.30/km
New Brunswick	$0.30/km
Nova Scotia	up to 16093 km = $0.315/km 16093 -24140 km = $0.29/km 24140 km+ = $0.19
PEI	$0.327/km
Newfoundland	$0.315/km
Yukon	$0.48.5/km
NWT	if travel required $0.485/km in NWT, $0.395/km outside if travel requested $0.21/km
Federally Appointed Judges (N.S.)	$0.415/km

It will be noted from the foregoing information that the third step down in the Nova Scotia mileage rate structure seems particularly punitive for judges who are required to travel by car extensively for their judicial work.

The Government in its submission merely asserted: "Judges are paid the same mileage as civil servants and there is no justification for paying more". The Judges' Association presented credible

information collated by the Canadian Automobile Association to the effect that Nova Scotia ranks as the fourth most expensive province or territory in which to operate a vehicle. Moreover, the same source indicates that in "high cost provinces" the average cost of running a "compact vehicle" is 45.5¢ per km. and even for a "sub-compact" the figure is 44.6¢ per km. At these rates, the federal mileage rate is clearly the closest to reimbursement for actual costs, while the Nova Scotia figure is far off the mark.

How must this Tribunal resolve the mileage issue? The answer to this question is found in section 21E(3) of the *Provincial Court Act*: "[w]hen making recommendations pursuant to this section, a tribunal shall take into consideration..." the ten enumerated factors considered above in relation to all the other matters referred to in section 21E(1), including (e) "non-discretionary benefits", such as mileage allowances. Balancing all the relevant factors, and accepting that a two step rate may best reflect fixed and variable costs, we conclude that a rate of 34¢ per km. for the first 20,000 kms. and 30¢ per km. thereafter is appropriate in the circumstances.

This conclusion, however, does not end the matter. In the course of its submissions, the Government offered an alternative to its "hold the line" mileage response. The Government stated it would be willing to offer judges who travel above 30,000 kms. per year the option of obtaining a leased vehicle. The Government proposal reads as follows:

> Government is agreeable, in the case of judges who travel more than 30,000 km./yr., to provide those judges with the option of the current mileage rate, or a leased vehicle wholly paid for by government, with all costs covered by government, ie, gas, repairs, maintenance, insurance, PROVIDED:

1. the vehicle leased has a purchase price of not more than $25,000, and

2. the vehicle is used for business*, or in the event the judge uses the vehicle for his/her own personal use*, that government be reimbursed for such personal use in the amount of 21.3¢/km.

* "Business use" includes travelling from home to any satellite courts (other than the judge's "home" court) to which the judge travels to hold court.

*"Personal use" includes travelling from home, to the home court to which the judge is assigned.

Since this option may be attractive to certain judges, and since the Government has doubtless calculated it was economically desirable, even in contrast with the government's mileage submissions which are less generous than our recommendation, we are pleased to endorse the leasing option.

Recommendation 6:

Based upon the evidence presented to it and the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal makes the following recommendation with respect to the non-discretionary benefit of compensation for vehicular travel:

(a) that judges using their own vehicles for travel necessary for their judicial duties be compensated at the rate of 34¢ for the first 20,000 kms. and 30¢ for each km. thereafter; and

(b) that judges who travel more than 30,000 kms. per year may opt for a leased vehicle wholly paid for by the Government (including costs of gas, repairs, maintenance and insurance, provided

(i) the vehicle leased has a purchase price of not more than $25,000; and
(ii) the vehicle is used for business, or in the event the judge employs it for his own personal use, that the Government be reimbursed at the rate of 21.3¢ km.

H. Income Protection: Sick Leave, Short-Term Disability and Long-Term Disability

Other than salary, the issue of income protection is the most difficult and most important which the Tribunal must address. The situation in which provincially appointed judges currently find themselves with respect to sick leave, short-term disability and long-term disability coverage is, in both legal and practical terms, anomalous. In fact, the present situation is simply unacceptable in the light of the factors which are set out in section 21E(3) of the *Provincial Court Act* and which are, at least in part, an embodiment of mandatory constitutional principles.

The present provisions for provincially appointed judges on sick leave, short-term disability and long-term disability are affected by sections in the *Provincial Court Act* (sections 6, 20(1)(b) and 23), the *Family Court Act and Regulations* (sections 5, 14(1) and N.S. Reg. 181/83), the *Civil Service Act and Regulations* (section 45 and Regs. 158/85; 108/92 and 39), the *Public Service Superannuation Act* and various Orders in Council. These multifarious legal provisions are to a considerable degree over-lapping, if not outright inconsistent, and have been made to work for the judges, in some measure, by creative administration. The substance of the plan is described in the Judges' Association written submission in the following terms:

> 127. Very briefly, the STD plan consists of two separate components - general disability leave and short term disability leave. The Deputy Head may authorize general disability leave with pay not exceeding 18 days per year. Moreover, general disability cannot exceed three consecutive work days. Short term disability leave may be authorized by the Deputy Head for up to 100 days consecutive absence. Two absences on short term leave, related to the same cause or causes, within 30 consecutive days shall be considered as one disability. Short term leave does not apply to absences of three days or less. Consequently, an employee who exhausts the 18 days of general leave

in a year is not covered for the first three days of any subsequent absence. Moreover, employees on short term leave do not receive full pay. Employees with less than one year of service receive full pay for the first 20 days of absence and 75% for the next 80 days. Employees with more than one year of service get 100% of their normal salary for the first 40 days and 75% for the next 60 days. Employees who have accumulated sick leave credits can use them to top up short term disability benefits to 100% on the basis of one-half day of sick leave credits for each day topped up. Only persons in the Government's employ prior to 1985 could have accumulated sick leave credits. For judges, this means that only those who were appointed prior to 1985, or were Crown Prosecutors or Legal Aid lawyers before that date, might be able to top up their short term disability leave benefits.

128. Coverage under the LTD plan is triggered after an employee has been on short term disability for 100 consecutive work days. It provides for payment of 70% of normal salary up to a maximum benefit of $2,000 bi-weekly. This translates into a maximum annual benefit of $52,000 which only represents 36% of the judges' present salary. However, the 1999 Tribunal amended the LTD plan as it applies to judges. It removed the $2,000 bi-weekly cap on benefits and, at the same time, reduced the benefit from 70% to 65% of salary.

129. Under the LTD plan, persons in receipt of benefits prior to April 6, 1992 were entitled to have their pension contributions paid out of the LTD fund. Since April 6, 1992, however, pension contributions have been deducted from LTD benefits. Because the LTD plan is one where both the employer and the employee contribute toward the premiums, the LTD benefits are taxable in the hands of the employee.

130. The LTD plan provides "own occupation" coverage for 30 months. Thereafter, an employee is only considered to be eligible for further benefits if he or she is unable to engage in "any occupation for remuneration or profit for xvl1ich the employee is or may become fit through education, training, experience or rehabilitation, which occupation pays not less than 80% of the current rate of the position, class and step he/she held prior to disability".

131. Although there was no request from provincially appointed judges to make the LTD plan applicable to them, the Government

nevertheless began deducting contributions from the pay cheques of all judges on May 1, 1985. The plan is primarily sponsored by the Government and the Nova Scotia Government and General Employees Union. It forms part of the collective agreement between the Government and N.S.G.G.E.U. and is, therefore, subject to periodic negotiation. There is no private insurer providing the LTD coverage. The plan is administered by Maritime Life Assurance Company.

132. Under the LTD plan, the government and employees have shared the payment of the following premiums rates on a 50/50 basis:

Total shared premium rates: 1985 - 0.4% gross salary
Premium increases: October 1, 1988.... .7%
April 1, 1989..... 1.0%
April 1, 1992..... 2.0%
April 1, 1995..(N.S.G.G.E.U. only) 2.2%

Other contributions: Unemployment Insurance rebates.

133. Notwithstanding the foregoing, the maximum employee contribution is currently fixed at $28.57 bi-weekly which represents one percent of the deemed maximum normal bi-weekly salary of $2,857.14 ($74,285.64 on an annualized basis).

134. Despite the changes made by the 1999 Tribunal, the Association has very grave concerns about the adequacy, fairness and legality of the current LTD regime. To the best of the Association's knowledge, only one judge has ever been placed on LTD benefits. Judge David Cole was unable to work from mid-October of 1990 until July 1, 1991 due to an illness which required major surgery and an extended period of convalescence. He was paid full salary until March 22, 1991 when he commenced receiving disability benefits of $2,000.00 bi-weekly under the aforesaid LTD plan. This was approximately 50% of his regular salary at the time. Such treatment of Judge Cole may be contrasted with that accorded to another judge who was disabled for nearly two years in the mid 1990's and yet continued to receive full salary.

The present Tribunal has come to the conclusion that the present situation on income protection for sick leave, short-term disability and long-term disability does not comport with the constitutional requirements for financial security, security of tenure and administrative independence required by the *P.E.I. Judges Reference Case* and incorporated as a factor for our consideration by section 21E(3)(a) of the *Provincial Court Judges Act*. The 1999 Tribunal, our predecessor, was clearly uneasy about the income protection issues. It made some recommendations for stop-gap improvement to the situation which were adopted by the Government. However, in our view, its most important statement on the topic is found in the following passage:

> Both the Nova Scotia Judges' Association and the Province of Nova Scotia devoted a considerable portion of their oral and written arguments to the appropriate elements of an LTD Plan for provincially appointed judges. It was the Tribunal's impression that some of the proposals were being heard for the first time and that few, if any, had been the subject of face to face negotiation. With the one exception outlined below, the Tribunal has decided to simply direct that judges be governed by the same terms as are presently contained in the Province's LTD Plan. We believe that a significant number of the proposals advanced by both the Association and the Province suggest reasonable parameters for a new LTD Plan which, in the end result, would be better drafted by a consultative process. We urge the parties to take advantage of the opportunity being deliberately accorded them now. (Emphasis added)

This Tribunal endorses those remarks and will make recommendations below designed to

encourage the Government and the Judges' Association to take more comprehensive steps to address the problem in a timely fashion.

The Tribunal is in agreement that, at a minimum, there are certain principles which must underlie a remedy for the present difficulties. Firstly, income protection of this sort is an important aspect of the maintenance of judicial independence. Secondly, there must be an income protection plan in relation to sick leave, short-term and long-term disability which is established to respond to judicial requirements and which involves the Judicial Council in appropriate aspects of its administration. The present situation where judges are rolled into a civil service plan which is subject to periodic re-negotiation by the Nova Scotia Government Employees Union and the Government, and which is oriented to the circumstances and needs of civil servants, is incompatible with the principles underlying the constitutional status of Provincial and Family Court Judges.

The Tribunal therefore concludes that the Government and the Judges' Association should have a reasonable period either to agree upon the terms of an income protection plan which reflects the needs of judicial independence and meets the other requirements of section 21E(3) of the *Provincial Court Act*, or to present full submissions to the Tribunal for such a plan which can be the subject of Tribunal recommendations to the Minister under the *Act*. In the interim, the Tribunal recommends that the current income protections, incorporating the improvements in response to the 1999 Tribunal recommendations, form a minimum floor which is not to be affected by any changes which may flow from current negotiations between the Government and the Nova Scotia Government Employees Union. Furthermore, the Tribunal is especially concerned with the potentially inappropriate effects of

section 6 of the current STD plan which puts an 18 day ceiling on general disability leave, and could deprive a judge of pay if he or she happens to be beset by a series of ailments in a given year. The Tribunal is convinced that full salary continuance in such circumstances through to the applicability of short-term and long-term disability, is the appropriate treatment to be accorded judges of the Provincial and Family Courts.

Recommendation 7:

Based upon the evidence presented to it and the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal makes the following recommendations:

> **(a) that the Government and the Judges' Association present to the Tribunal on or before October 1, 2002 either**
>
> > **(i) an agreed upon plan for income protection covering sick leave, short-term disability, long-term disability and other such relevant matters; or**
> > **(ii) separate submissions on the issues referred to in subsection (i), should agreement between the Government and the Judges' Association not be reached, in order that the Tribunal may make appropriate recommendations on a plan to the Minister within six weeks of receipt of the agreed plan or the submissions, as the case may be; and**
>
> **(b) that until such time as a new income protection plan is put in place, the currently applicable provisions affecting Provincial and Family Court Judges continue in force, with the proviso that the 18 day annual ceiling on general disability be eliminated to insure full salary continuance for such judges until eligibility for short-term or long-term disability benefits.**

I. Life Insurance, Health and Dental Benefits

There was no issue raised as to life insurance, health or dental benefits raised by either the Judges' Association or the Government in the course of the hearing before the Tribunal. However,

under section 21E(1)(d) of the *Provincial Court Act*, the Tribunal is under an obligation to make recommendations on such matters. In its written submission the Government urged that present arrangements continue, and provided information on their general terms. The Judges' Association takes no issue with this. The Tribunal is also in agreement, seeing no issues in relation to the factors in section 21E(3) of the *Act*.

Recommendation 8:

Based upon the evidence presented to it and the relevant ten factors that the Tribunal is directed to consider under section 21E(3) of the *Provincial Court Act*, the Tribunal recommends that current arrangements with respect to life insurance, health benefits and dental benefits for judges of the Provincial and Family Court continue in their present form.

J. Conclusions

The members of the Tribunal are pleased to have been able to agree on the foregoing recommendations which are all respectfully submitted to the Honourable Michael Baker, Minister of Justice, pursuant to sections 21A through 21N of the *Provincial Court Act*. Our hearings and deliberations were made easier by the co-operative approach taken by counsel for the Government and for the Judges' Association to the gathering and presentation of material, particularly given the time constraints under which this Tribunal has had to operate. We note in conclusion that, apparently for the first time, the activities of the Tribunal generated interest among members of the general public, resulting in two written submissions (see Appendix B). These submissions were considered by the Tribunal and circulated to the Government and to the Judges' Association. While not all of the contents of these public submissions were relevant to the precise issues within the mandate of the Tribunal, some indeed were. Moreover, these public

APPENDIX A

Proposed wording for Tribunal recommendation to implement new pension arrangement for Provincial Judges

1. Notwithstanding the provisions of subsections (2) and (3) of Section 23 of the Provincial Court Act, a pension shall be payable in respect of a judge who is appointed on or after the first day of April, 2002, to a judge who:

(a) has continued in office for at least twenty years, has attained the age of at least sixty years and ceases to hold office, or

(b) has continued in office for at least ten years and resigns if, in the opinion of the Governor in Council, the resignation is conducive to the better administration of justice or in the public interest, or

(c) has continued in office for at least five years and has ceased to hold office by reason of having attained the age of sixty-five years, or

(d) has continued in office for at least five years but less than ten years, has become afflicted with a mental or physical infirmity which disables the judge from the due execution of judicial duties, and has resigned as a judge or, by reason of such infirmity is removed as a judge.

2. Subject to subsection 4(1), a pension payable pursuant to Section 1 shall be calculated as:

(a) prior to age sixty five, 3.5% of the average of the judge's best three years' salaries, multiplied by the number of years of service as a judge to a maximum of twenty years

(b) commencing at age sixty five, the amount otherwise determined in clause (a) without reference to age, less an amount calculated as 0.7% of the average of the best five years' salaries that are within the Year's Maximum Pensionable Earnings for those years, as determined in the Canada Pension Plan, multiplied by the number of years of pensionable service determined pursuant to the Public Service Superannuation Act.

3. The spouse, common-law partner, child or dependant of a judge who dies and would have been entitled to receive a pension if the judge had attained the age of sixty-five years immediately prior to death or was in receipt of a pension pursuant to Section 1 at the time of death, shall be entitled to a pension in the same percentages and payable terminating under the same terms and conditions as if the judge were receiving or would have received such pension pursuant to the Public Service Superannuation Act.

4. (1) A pension payable pursuant to Section 1 or Section 3 shall be reduced by any amount payable pursuant to the Public Servant Superannuation Act.

(2) A pension payable pursuant to Section 1 or Section 3 in excess of any amount payable pursuant to the Public Servant Superannuation Act shall be charged to the Consolidated Fund of the Province.

(3) A pension payable pursuant to Section 1 or Section 3 shall be increased in accordance with increases in the cost of living in the amount from time to time determined in the manner prescribed by the Governor in Council pursuant to the Public Service Superannuation Act.

5. (1) Notwithstanding the provisions of section 21N and subsection (3) of Section 23 of the Provincial Court Act, sitting judges on the thirty first day of March 2002, excluding retired judges and judges elevated from the Family Court to the Supreme Court (Family Division), have the option to elect to receive pension benefits to which judges appointed on or after the first day of April 2002 are entitled, and may make this election at the time of retirement.

(2) A judge who elects to retire before age sixty five, shall give the Chief Judge notice of this election at least three months before retiring, unless the Chief Judge waives the whole or any portion of t he notice period.

(3) The pension benefits of a judge appointed on or after the first day of April 2002, shall be governed by the provisions herein.

6. (1) In these provisions, a reference to "judge" means a judge of the Provincial Court and a judge of the Family Court.

(2) The definitions in subsection (1) of Section 23 of the Provincial Court Act apply to these provisions.

APPENDIX B

Submissions from the Public

Submissions were received from the following members of the general public:

Ms. Connie Brauer and Mr. Vic Harris
Executive Directors
Canadian Civil Rights Action Group
1061 Mines Road
Falmouth, NS
B0P 1L0

Mr. Brian and Mrs. Thelma Gillespie
156 Nordic Crescent
Lr. Sackville, NS
B4C 2E6